MH

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

March 8, 2007

Honorable Cathy Catterson
Clerk, U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Cristobal Rodriguez Benitez v. Silvia Garcia, No. 04-56231

Dear Ms. Catterson:

Enclosed please find an original and fifty (50) copies of the Amicus Curiae Brief by the United States in Support of Respondent-Appellee's Petition for Rehearing and Rehearing En Banc in the above-referenced case. A certificate of service is attached to the brief.

Sincerely,

JASON E. CARTER
Associate Director
Office of International Affairs
Criminal Division
1301 New York Avenue, N.W.
Suite 800
Washington, D.C. 20044
(202) 616-3073

cc: Barbara K. Strickland, Esq.
Matthew Mulford, Esq.

95-100-9366

04-56231

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRISTOBAL RODRIGUEZ BENITEZ,

Petitioner-Appellant,

v.

SILVIA GARCIA, Warden,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

AMICUS CURIAE BRIEF BY THE UNITED STATES IN SUPPORT OF RESPONDENT-APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

DAVID O. BUCHHOLZ
Attorney-Adviser
Office of the Legal Adviser
Department of State

MARY ELLEN WARLOW
Director, Office of International Affairs

JASON E. CARTER
Associate Director, Office of
International Affairs

KATHLEEN A. FELTON
Attorney, Office of International Affairs
Criminal Division
U.S. Department of Justice
Washington, DC 20005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Supreme Court Decisions:

Circuit Court Decisions:

District Court Decisions:

Statutes:

Miscellaneous:

04-56231

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRISTOBAL RODRIGUEZ BENITEZ,

Petitioner-Appellant,

v.

SILVIA GARCIA, Warden,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

AMICUS CURIAE BRIEF BY THE UNITED STATES IN SUPPORT OF RESPONDENT-APPELLEE'S PETITION FOR REHEARING EN BANC

INTEREST OF THE UNITED STATES

This case concerns international extradition and diplomatic relations between the United States of America, amicus curiae herein, and the United States' treaty partners. The United States is a party to extradition treaties with more than one hundred countries and has a substantial interest in the proper interpretation of such treaties. This case presents the important question of whether a condition asserted

unilaterally by a foreign government, rather than being negotiated through "the receipt of satisfactory assurances" from the requesting country, as specified in the extradition treaty, is binding on courts and prosecutors. This brief is submitted pursuant to Rules 29 and 40 of the Federal Rules of Appellate Procedure.

STATEMENT

1. Under the United States-Venezuela Extradition Treaty of 1922, either nation can request assurances that an extradited person not be subject to a sentence of death or life imprisonment; while nothing in the Treaty precludes the extradition of a person absent such assurances, the Executive Authority of the surrendering state can, if it chooses to do so, decline extradition unless it obtains a satisfactory assurance to this effect. See infra. In November 1997, in connection with Appellant's extradition, the Government of Venezuela asked for assurances that the death penalty would not be sought; there was no request for any other assurances. See Appellee's Supplemental Excerpts of Record (SER) at 58, 62-63. In response, the United States Embassy sent to Venezuela a diplomatic note dated November 6, 1997, which stated that, if extradited, Cristobal Rodriguez Benitez "would not be sentenced to death. . . . Furthermore, if convicted . . . Rodriguez Benitez would receive a sentence of incarceration of 25 years to life [and] would have the right to a parole request after serving the minimum mandatory prison term of 19 years and 2 months." SER at 9. On February 27, 1998, the Attorney General of Venezuela reported this to the

Venezuela Supreme Court, stating, "Considering this situation, it has been fully determined that capital punishment shall not be applied in any case, and, in principle, not even life imprisonment." SER at 14-15.

On June 4, 1998, the Venezuela Supreme Court issued a decree granting extradition, but stating that Rodriguez Benitez was not to receive the "death penalty or life imprisonment or punishment depriving his freedom for more than thirty years, pursuant to" Venezuelan law. SER at 26-27. Notwithstanding the Venezuelan court's statement, and without seeking any additional assurances, Venezuela surrendered Rodriguez Benitez to the United States on August 28, 1998. SER at 58.

Rodriguez Benitez was convicted of murder. SER at 64-65. In July 1999, after inquiries by the Government of Mexico concerning its citizen, Venezuela notified the United States of its view that a sentence of life imprisonment imposed on Rodriguez Benitez "may" violate the terms of the U.S.-Venezuela extradition treaty and the decree of the Venezuela Supreme Court authorizing the extradition. SER at 63-64. On August 30, 1999, the day before Rodriguez Benitez's sentencing, the State Department wrote to the District Attorney, stating:

> As was its right under the U.S.-Venezuela extradition treaty, before extraditing Mr. Rodriguez Benitez, the Government of Venezuela sought an assurance that he would not face the possibility of the death penalty if extradited.... [T]he United States ... conveyed an assurance to this effect .... In doing so, the United States also advised the Government of Venezuela that Mr. Rodriguez Benitez

> would face the possibility of life imprisonment .... In July 1999, ... the Government of Venezuela formally advised the United States that in its view Mr. Rodriguez should not receive the death penalty or a life sentence. Although the express terms of the U.S.-Venezuela treaty would have allowed Venezuela to seek this additional assurance prior to the extradition, it did not do so, and extradited Mr. Rodriguez Benitez based solely on the death penalty assurance.

SER at 58 (emphasis included). The State Department then voiced its recommendation (and that of the Department of Justice) that, because of Venezuela's concerns, it would be in the best interests of the U.S.-Venezuela extradition relationship if Rodriguez Benitez did not receive a life sentence. However, the letter made clear that this recommendation was not based on any international legal or other obligation. SER at 59, 64-65. Rodriguez Benitez was sentenced to an indeterminate term of 19 years to life imprisonment.

2. Following an unsuccessful appeal in which he argued that his sentence violated the extradition treaty and decree, Rodriguez Benitez raised the same challenge in a federal habeas petition. The district court denied relief, explaining that no assurances were sought or received regarding either a life sentence or a 30-year maximum and that the entirely unilateral statements in the decree were not binding on the United States. Benitez v. Garcia, 419 F. Supp.2d 1234 (S.D. Cal. 2004).

A panel of this Court (Nelson, D., Farris and Tallman, JJ.) reversed and remanded, holding that California was barred from sentencing Rodriguez Benitez to

more than 30 years' imprisonment. Recognizing that under the AEDPA, 28 U.S.C. 2254(d)(1), it could grant habeas relief only if the state court decision was an unreasonable application of clearly established federal law, the court found that standard met. Analogizing from Supreme Court cases on the rule of specialty, United States v. Rauscher, 119 U.S. 407 (1886), and Johnson v. Browne, 205 U.S. 309 (1907),the panel held that it must defer to the wishes of the surrendering country. The court found determinative that Venezuela expected Rodriguez Benitez to receive a sentence of no more than 30 years, and it found it unnecessary to defer to the views of the Executive Branch on the meaning of the treaty because in this case there was no "clear executive position." Benitez v. Garcia, 449 F.3d 971, 975-978 (9th Cir. 2006).

The State filed a rehearing en banc petition, and on January 22, 2007, the panel issued an amended opinion.[1] This time the panel was more explicit that the "state court's failure to give effect to the Venezuelan extradition order was an objectively unreasonable application of Rauscher and Browne, the clearly established Supreme Court precedent." Benitez v. Garcia, ___ F.3d ___, 2007 WL 415319, *5 (9th Cir. 2007). The panel read those cases as requiring "that language in a foreign nation's extradition order invoking provisions of an extradition treaty must be enforced by

[1] The panel issued another amended opinion with minor additional changes on February 8, 2007. We cite to that later opinion.

federal courts." Id. at *4. The court concluded:

> Thus, the Supreme Court has clearly established that the expectations of the extraditing country – at least those within its rights, expansively interpreted, under the extradition treaty and expressed in its official extradition order – limit a state's ability to prosecute and sentence the extradited defendant.

Ibid. The panel retreated from its earlier opinion in one respect, this time holding that Venezuela could not have expected a 30-year cap on the sentence, because the treaty contained no provision for receiving assurances of such a limitation. Id. at *5. Accordingly, the panel ordered that California could sentence Rodriguez Benitez to any term of years, but not to life imprisonment. Ibid.

ARGUMENT

INTRODUCTION

Though the panel has amended its opinion to hold that Venezuela could not expect that the defendant's sentence would be limited to less than thirty years' imprisonment, its basic holding remains unchanged: that Venezuela's unilateral assertion of a limit on the defendant's sentence is binding on United States courts. That holding is fundamentally flawed, and the full Court should reconsider the panel's decision.

Of most importance to the United States, the panel has seriously misread the applicable extradition treaty, essentially nullifying the treaty's reference to "the receipt of satisfactory assurances," and thereby interfering with the ability of the

Executive Branch to negotiate and enforce extradition treaties.[2] This case thus presents a question of exceptional importance that warrants rehearing en banc.

I. THE PANEL HAS MISREAD BOTH THE PLAIN LANGUAGE OF THE TREATY AND ITS INTERPRETATION BY THE EXECUTIVE BRANCH

The panel's decision warrants reconsideration by the full Court because it represents a misreading of the United States-Venezuela Extradition Treaty. The panel has ignored both the Treaty's plain language and the interpretation of the Treaty given by the Executive Branch agencies charged with its negotiation and enforcement.

Extradition between Venezuela and the United States is governed by the Treaty of Extradition signed at Caracas on January 19 and 21, 1922, entered into force on

---

[2] In addition, the panel's opinion conflicts with a recent Supreme Court decision, Carey v. Musladin, 127 S. Ct. 649 (2006), which held that a federal court may consider only direct holdings of the Supreme Court as "established federal law" when granting habeas relief to a state prisoner under 28 U.S.C. 2254(d)(1). The panel itself recognized that the doctrine of specialty, which deals only with the offenses on which an extradited defendant may be tried – not with any limitation on his sentencing – "is not at issue here." Benitez, 2007 WL 415319 at *5 n.2. Yet the panel nevertheless ruled that Supreme Court cases on the rule of specialty constituted "clearly established federal law" that the state court had incorrectly failed to apply. Because the Supreme Court has never addressed the issue in this case, the panel erred in holding that it could grant habeas relief because the state court had incorrectly failed to apply "clearly established federal law." See Musladin, 127 S. Ct. at 654.

We do not address in detail that aspect of the panel's opinion, as the United States has no direct interest in questions concerning the proper interpretation of 28 U.S.C. 2254(d), applicable only to state prisoners on habeas.

April 14, 1923. Article IV of the Treaty states:

> In view of the abolition of capital punishment and of imprisonment for life by Constitutional provision in Venezuela, the Contracting Parties reserve the right to decline to grant extradition for crimes punishable by death and life imprisonment. Nevertheless, the Executive Authority of each of the Contracting Parties shall have the power to grant extradition for such crimes upon the receipt of satisfactory assurances that in case of conviction the death penalty or imprisonment for life will not be inflicted.

In interpreting a treaty, courts must give its "specific words . . . a meaning consistent with the shared expectations of the contracting parties," El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 167 (1999) (internal citations omitted), without "'alter[ing], amend[ing], or add[ing] to the treaty, by inserting any clause, whether small or great, important or trivial.'" Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989) (quoting The Amiable Isabella, 19 U.S. 1, 71, 6 Wheat. 1, 71 (1821)). "An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose." Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2679 (2006) (quoting Restatement (Third) of Foreign Relations Law of the United States). And the views of the Executive Branch on the meaning of the treaty are entitled to respect. See El Al Israel Airlines, 525 U.S. at 168; Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and

enforcement is entitled to great weight.").[3]

Nothing in the U.S.-Venezuela Treaty establishes a right in either treaty party to limit sentences unilaterally, without the agreement of the other party. Rather, it provides the parties with three options when addressing a case involving a potential penalty of death or life-imprisonment: (1) a party may refuse extradition; (2) a party may grant extradition "upon receipt of satisfactory assurances" that the unacceptable punishment (death or life imprisonment) will not be imposed; or (3) a party may grant extradition without seeking any assurances regarding the potential punishment. In this case, Venezuela chose to request assurances, but only with respect to the death penalty. It did not refuse to extradite or request assurances, as it could have done, with regard to life-imprisonment.

When sentencing assurances are provided, they reflect the agreement of the parties to the extradition treaty and are enforced by the courts. See, e.g., United States v. Campbell, 300 F.3d 202 (2d Cir. 2002) (where United States assured Costa Rica, before extradition, that defendant would not serve more than 50 years, district court ordered defendant, sentenced to 155 years' imprisonment, released after 50 years), cert. denied, 538 U.S. 1099 (2003); United States v. Casamento, 887 F.2d

---

[3] The Department of State, with the support of the Department of Justice, Criminal Division, Office of International Affairs, is charged with the negotiation of U.S. extradition treaties and their enforcement.

1141, 1185 (2d Cir. 1989) (court adhered to 30-year limit imposed by Spain on defendant's extradition where United States expressly acceded to Spain's terms), cert. denied, 493 U.S. 1081 (1990); see also United States v. Baez, 349 F.3d 90 (2d Cir. 2003) (finding that United States had honored specific terms of assurances given in diplomatic correspondence: to request but not guarantee less than a life sentence).

Conversely, where the United States does not give assurances, a sending country's unilateral expectations do not bind American courts, which do not apply foreign law in determining sentences and which enforce only express agreements by both parties. See United States v. Banks, 464 F.3d 184, 191-192 (2d Cir. 2006) (in absence of any agreement with United States limiting defendant's sentence, Dominican Republic's unilateral expectation that sentence would be limited to maximum under Dominican law would not bind United States); United States v. Lehder-Rivas, 955 F.2d 1510, 1520-1521 (11th Cir. 1992) (applying U.S. law in sentencing a defendant extradited from Colombia, without regard for maximum sentence under Colombian law); United States v. Cuevas, 402 F.Supp. 2d 504, 506 (S.D. N.Y. 2005) (court not bound by foreign decree purporting to cap at 30 years the possible sentence for extradited defendants where United States had not agreed to such a condition).

Here, however, the court held that Venezuela did not need to seek and receive assurances as the Treaty requires. The panel did not dispute that Venezuela failed to

follow the terms of the Treaty to ensure that Rodriguez Benitez would not be subject to life imprisonment. Instead, the court relied on what it termed an "expansive" interpretation of the Treaty, to hold that "Venezuela's attempt to exercise its rights under the extradition treaty [must] be honored, despite its failure to extract contractually binding assurances from the United States that a life sentence would not be imposed." Benitez, 2007 WL 415319 at *5. But by reading out of the Treaty the assurance provision, the panel has not read the Treaty "expansively;" rather, its interpretation restricts the rights of the country requesting extradition (in this case, the United States) to sentence offenders in accordance with its own law even when, pursuant to the Treaty, such a sentence would be permitted. This puzzling result rests on several pieces of contradictory reasoning.

First, the panel determined that its "expansive" reading of Venezuela's rights was required by United States v. Rauscher, 119 U.S. 407 (1886), and Johnson v. Browne, 205 U.S. 309 (1907), both of which address the "rule of specialty," a distinct doctrine of international extradition law. The rule of specialty establishes that an extradited defendant may not be prosecuted and punished on *charges* other than those for which he was extradited. See Rauscher, 119 U.S. at 430 (an extradited defendant "can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition"); Browne, 205 U.S. at 316 (impermissible to try a defendant other than "for the crime for which he has

been extradited").[4] It says nothing about any limitations on a defendant's sentence or other aspects of a prosecution.[5] Indeed, the panel in this case recognized that the "well-settled doctrine" of specialty "is not at issue here" before proceeding to rely on it. Benitez, 2007 WL 415319 at *5 n.2.

Second, the Court in Rauscher applied the rule of specialty because it was necessitated by a close reading of the applicable treaty's terms and the recognized principle of extradition law, which limited the types of offenses for which an extradited person could be prosecuted. It would no doubt surprise that Court that its holding was being cited to justify a result that is inconsistent with specific treaty terms.

Third, despite its conclusion that the Treaty must be "expansively interpreted," and that the expectations of extraditing states must be enforced, the panel correctly recognized that it could not enforce any attempt to limit Rodriguez Benitez' sentence to 30 years because "[t]he treaty says nothing about sentences for a specific term of

---

[4] This principle is specifically embodied in the U.S.-Venezuelan Treaty, in Article XIV: "No person shall be *tried* for any *crime or offense* other than for which he was surrendered" (emphasis added).

[5] See United States v. Flores, 538 F.2d 939, 944 (2d Cir. 1976) (specialty doctrine "has never been construed to permit foreign intrusion into the evidentiary or procedural rules of the requisitioning state"); United States v. Garcia, 208 F.3d 1258, 1261 (11th Cir. 2000) (specialty rule does not limit admissibility of evidence in sentencing a defendant for crimes for which extradition was granted), vacated on other grounds, 531 U.S. 1062 (2001).

years." Benitez, 2007 WL 415319 at *5. Of course, the Treaty also says nothing about enforcing unilateral sentencing decrees, although it is very plain as to how sentencing conditions are to be negotiated. The panel does not explain the inconsistency in strictly enforcing the terms of the Treaty in one instance while simultaneously ignoring those terms in another.

The panel's interpretation was not only contrary to the Treaty's plain language, but also to its interpretation by the Executive Branch, which wrote a letter (SER at 58-59) making clear its position: that it did not interpret Venezuela's unilateral wishes as having any legal import; that Venezuela knew Rodriguez Benitez faced the possibility of life imprisonment and extradited him despite that knowledge; that there was no requirement arising out of his extradition that he not serve a life sentence; and that "the United States was explicit regarding the assurances it provided the Government of Venezuela, which only encompassed the death penalty." Id. Thus there is a clear executive position on the proper interpretation of the Treaty and the effect of Venezuela's unilateral condition, and the panel should have deferred to that interpretation.

Finally, it is not clear that the panel was accurate in evaluating Venezuela's expectations at the time of the extradition. In this regard, it is notable that the panel has omitted a key fact in its procedural and factual chronology. As the district court found, and as set forth above, Venezuela specifically invoked the procedure in the

Treaty to ask for assurances that Rodriguez Benitez would not face the death penalty, and the United States gave those assurances along with a further explanation of exactly what sentence he would face if convicted. The response of Venezuela's Attorney General to that explanation was not to request further assurances, but rather to endorse the extradition and explain to his own supreme court that, based on the U.S. description of the sentence, "in principle" Rodriguez Benitez would not serve a life sentence. Venezuela's subsequent belated complaint that the possible sentence might violate the treaty – made nearly a year after it surrendered Rodriguez Benitez and only after Mexico inquired about its citizen's status – cannot change the fact that, though it was familiar with the procedure to follow for obtaining assurances concerning the sentence, it chose not to follow that procedure with respect to the life sentence.

II. THE PANEL'S DETERMINATION THAT THE UNITED STATES MUST ADHERE TO UNILATERAL CONDITIONS ON EXTRADITION IS INCONSISTENT WITH THE TREATY MAKING AND FOREIGN POLICY PREROGATIVES OF THE EXECUTIVE BRANCH.

The panel's decision interferes with the ability of the Executive Branch to negotiate and enforce extradition treaties. The Supreme Court has made clear that the conduct of our foreign affairs is entrusted to the Executive:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when,

> how, and upon what subjects negotiation may be urged with the greatest prospect of success.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (quoting Senate Comm. on Foreign Relations, 1816).

Likewise, the Supreme Court has held that the judiciary does not have a role in foreign affairs, explaining that

> the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy.... They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). See also Alperin v. Vatican Bank, 410 F.3d 532, 560 (9th Cir. 2005).

The panel, in entertaining "the expectations of the extraditing country" about potential sentences, entered this domain. The U.S.-Venezuela Extradition Treaty does not permit the parties to impose any sentencing conditions unilaterally. All that Venezuela could reliably expect with respect to Appellant's sentence is that he would not be sentenced to death. And the only proper channel for establishing those expectations is through the Executive Branch.

Commitments made in extradition treaties are carefully negotiated and tailored to each individual treaty relationship. As with Article IV of the U.S.-Venezuela

Treaty, which notes Venezuela's legal restrictions on death and life-imprisonment ("In view of the abolition of capital punishment and of imprisonment for life by Constitutional provision in Venezuela..."), the United States can agree to treaty provisions that provide for the possibility of sentencing assurances, sometimes to accommodate constitutional or other constraints faced by treaty partners. Similarly, the United States might agree in a particular case to limitations sought by a treaty partner even when not contemplated by our bilateral Treaty. But the United States does not always agree to or provide such assurances.

Decisions to give assurances are quintessential Executive Branch decisions, made after consideration of foreign policy factors such as the development of law enforcement cooperation, the impact on diplomatic relations, and reciprocity, as well as of other factors within the sole competence of the Executive, such as prosecutorial discretion and balancing the competing interests of justice. The Executive Branch must be able to make such decisions without fear of judicial imposition of limitations from foreign governments as to which no Executive Branch consideration has occurred (or, worse, which the Executive Branch has determined to reject). Cf. Prasoprat v. Benov, 421 F.3d 1009, 1016-17 (9th Cir. 2005), cert. denied, 126 S. Ct. 1335 (2006) (Executive Branch, not court, makes decision on extradition matters involving foreign policy concerns); Patrickson v. Dole Food Co., 251 F.3d 795, 803-04 (9th Cir. 2001), aff'd in part, 538 U.S. 468 (2003) (court should not engage in

foreign policy by evaluating foreign government's view of litigation).

This is more than an academic issue. The United States negotiates extradition treaties that by their terms limit prosecutable offenses (under the rule of specialty), but does not negotiate to permit surrendering nations unilateral control over sentences. Some countries with which the United States has ongoing extradition relationships may refer to expectations limiting sentences in their extradition orders. Absent a specific agreement, however, the United States does not consider itself bound by such unilateral expectations, and in some cases defendants receive sentences that exceed those purported expectations. Nevertheless, our treaty partners continue to honor our bilateral treaties and extradite fugitives to the United States, perhaps after weighing diplomatic or other considerations. The panel's decision threatens this delicate balance, and thereby improperly intrudes into the treaty-making and foreign relations powers reserved to the Executive in its conduct of extraditions with other nations.

CONCLUSION

Appellee's petition for rehearing en banc should be granted, the panel's opinion should be vacated, and Appellant's petition for a writ of habeas corpus should be denied.

Respectfully submitted,

DAVID O. BUCHHOLZ
Attorney- Adviser
Office of the Legal Adviser
U.S. Department of State

MARY ELLEN WARLOW
Director, Office of International Affairs

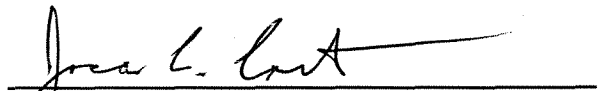
JASON E. CARTER
Associate Director, Office of
International Affairs

KATHLEEN A. FELTON
Attorney, Office of International Affairs
Criminal Division

U.S. Department of Justice
1301 New York Ave, N.W.
Suite 800
Washington, D.C. 20005
(202) 616-3073

CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULE 40-1

Pursuant to Ninth Circuit Rule 40-1, I hereby certify that the attached Amicus Curiae Brief by the United States in Support of Respondent-Appellee's Petition for Rehearing and Rehearing En Banc complies with Fed. R. App. P. 32(c)(2), has been prepared using Fourteen point, proportionally spaced, serif typeface (*i.e.*, Times New Roman) using WordPerfect 12, and contains 4,118 words.



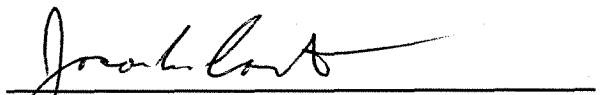
JASON E. CARTER
Counsel for Amicus Curiae
The United States of America

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused true and correct copies of the foregoing Amicus Curiae Brief by the United States in Support of Respondent-Appellee's Petition for Rehearing and Rehearing En Banc to be served this 8th day of March, 2007, by Federal Express, on:

Barbara K. Strickland, Esq.
Attorney at Law
110 Juniper Street
San Diego, CA 92101

Matthew Mulford, Esq.
Deputy Attorney General
State of California
Department of Justice
110 West A Street, Suite 1100
San Diego, CA 92101



JASON E. CARTER
Counsel for Amicus Curiae
The United States of America